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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MICHAEL J. SKAAR et al.,
Plaintiffs and Appellants,

v.

THOMAS CLEMENTS LACEY,
Defendant and Respondent.

A145508
(San Francisco County
Super. Ct. No. CGC-14538076)

The issue in this appeal is whether plaintiffs Michael J. Skaar and Roger T. Cole raised a triable issue of material fact regarding the timeliness of their complaint against defendant, Thomas Clements Lacey. Plaintiffs sued Lacey, their former landlord, in March 2014, claiming that in 2012 Lacey terminated their tenancy in a San Francisco rental unit in bad faith, thereby violating section 37.9(a)(8)(i) of the San Francisco Rent Ordinance (section 37.9(a)(8)). The trial court concluded plaintiffs' complaint was time-barred under the applicable one-year statute of limitations, and granted summary judgment to Lacey. Plaintiffs argue the court erred because their discovery of Lacey's bad faith was necessarily delayed until August 2013 by his extensive renovations to the premises, tolling the one-year statute of limitations during this time. Lacey disagrees and, further, argues we should disregard plaintiffs' delayed discovery argument because they did not plead facts supporting it in their complaint nor seek to amend their complaint below, thereby waiving this argument.

We conclude plaintiffs submitted facts in opposition to Lacey's summary judgment motion sufficient to create a triable issue of material fact regarding their delayed discovery of Lacey's purported bad faith. However, we agree with Lacey that we must disregard plaintiffs' delayed discovery argument in evaluating Lacey's motion for summary judgment because they did not plead facts supporting it in their complaint. However, we do not agree that plaintiffs necessarily have forfeited their delayed discovery claim. The trial court did not grant summary judgment based on their failure to plead delayed discovery, and this pleading defect is our sole basis for affirming the trial court's ruling. Under these circumstances, we have the discretion to allow plaintiffs an opportunity to seek leave to amend their complaint before judgment becomes final, and we exercise that discretion here. Therefore, we conditionally affirm the judgment. We remand this matter to the trial court with the instruction that it give plaintiffs 60 days to move to amend their complaint. Should they do so, the court should consider the motion and proceed accordingly, consistent with this opinion. Should plaintiffs not move for leave to amend within 60 days, the court should enter final judgment in Lacey's favor.

BACKGROUND

The undisputed facts are that in April 2012 Lacey asked plaintiffs to vacate their rental unit, located on Greenwich Street in San Francisco (premises). Plaintiffs rejected his request. On May 8, 2012, Lacey served a written notice to plaintiffs that he was terminating their tenancy under section 37.9(a)(8)[1] and requiring them to vacate the premises within 60 days. Lacey stated he intended to use and occupy the premises as his principal residence, and indicated the law required him to move in within three months of

[1] In their briefs, the parties cite to section 37.9 as it existed in 2012, the time of their dispute, but they have not submitted that former provision to us (it has been subsequently amended). We construe their actions as a request that we take judicial notice of this former provision. We hereby take judicial notice of it as it is stated in San Francisco Ordinance No. 72-11, effective May 27, 2011, which is presently archived on an official government website at <https://sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances11/o0072-11.pdf>.) (Evid. Code, §§ 459, 452, subds. (c), (h). Our references to section 37.9 are to this former provision.

the date plaintiffs vacated. Section 37.9(a)(8) allows such a termination, provided that the landlord "shall not endeavor to recover possession . . . unless" "[t]he landlord seeks to recover possession in *good faith*, without ulterior reasons and with honest intent . . . [¶] . . . [f]or the landlord's use or occupancy as his or her principal residence for a period of at least 36 months . . . ." (§ 37.9(a)(8)(i), italics added.) Section 37.9(a)(8) further provides, "It shall be rebuttably presumed that the landlord has not acted in good faith if the landlord . . . does not move into the rental unit within three months and occupy said unit as that person's principal residence for a minimum of 36 continuous months." (§ 37.9(a)(8)(v).)

Plaintiffs vacated the premises on July 7, 2012. On March 19, 2014, they sued Lacey, alleging eight different causes of action, all of which relied entirely on the core allegation that Lacey acted in bad faith in violation of section 37.9(a)(8), as demonstrated by his failure to move into the premises at any time during the approximately twenty months that had passed since plaintiffs had vacated the premises.[2] After quoting section 37.9(a)(8)(v)'s rebuttable presumption of bad faith if the premises remained vacant for three months, plaintiffs contended that "Lacey was required to move into the Premises on or before October 7, 2012, and thereafter occupy the Premises as his principal residence for 36 consecutive months, through October 7, 2015." They alleged he instead maintained a principal residence in Tiburon and kept the premises vacant, creating the rebuttable presumption that he "acted in bad faith and wrongfully recovered possession of the Premises in violation of the San Francisco Rent Ordinance." Plaintiffs sought treble damages under section 37.9 on several causes of action.

In October 2014, Lacey moved for summary judgment/summary adjudication. He argued plaintiffs' causes of action were filed more than one year after they accrued and, therefore, were time-barred under Code of Civil Procedure section 340, subdivision (a).

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[2] Plaintiffs sued for wrongful eviction under the Civil Code; wrongful eviction under the San Francisco Rent Ordinance; negligence; both intentional and negligent infliction of emotional distress; breach of the warranty of quiet enjoyment; breach of the covenant of good faith and fair dealing; and breach of lease.

He claimed in alternative arguments that plaintiffs' claims accrued when he asked them, and they refused, to vacate the premises in April 2012; when he served his termination notice to them on May 8, 2012; and when they concluded by November 8, 2012, that he had allegedly violated section 37.9(a)(8), even though this conclusion was based on their mistaken belief that he was required to move in by this time. Lacey presented evidence that plaintiffs never believed he intended to move into the premises, consulted a lawyer about his efforts to evict them, were informed on October 8, 2014, that the premises were vacant, personally observed the premises appeared vacant that fall, and concluded, as Skaar wrote by email to a private investigator on November 8, 2014, that Lacey had not moved in and was " 'already in clear, blatant violation of CCSF law,' " but that " 'his actions over the next year would count more than his initial failure to occupy.' "

Plaintiffs opposed Lacey's motion. They agreed their claims were subject to the one-year statute of limitations in Code of Civil Procedure section 340, subdivision (a), but argued there was a triable issue of material fact as to whether they timely filed their action, relying on *Sylve v. Riley* (1993) 15 Cal.App.4th 23 (*Sylve*).

Plaintiffs also contended, based on evidence they submitted with their opposition, that there was "abundant reason" for them to "refrain from filing suit prematurely" because "the Premises underwent extensive renovations rendering them uninhabitable until approximately August 2013. It was entirely reasonable for Plaintiffs to, at the same time, harbor suspicions about [Lacey's] initial motives or subsequent compliance with the law, while waiting to see if he would ultimately move into the Premises and begin principally residing there upon completion of repairs." Plaintiffs further contended that "[t]he earliest reasonable point in time for measuring the one-year statute of limitations" was August 2013, when "all visible construction was completed at the Premises rendering them move-in ready."

In reply, Lacey argued *Sylve* was inapposite because section 37.9(a)(8) was subsequently amended to create a rebuttable presumption of bad faith if the premises remained unoccupied for three months and plaintiffs had concluded Lacey had violated section 37.9(a)(8) by November 8, 2012, when Skaar wrote to the private investigator

that Lacey was in "blatant violation" of the ordinance. Lacey also argued, among other things, that the trial court should not consider plaintiffs' delayed discovery argument because they had not pled facts to support this theory in their complaint. He also filed numerous objections to plaintiffs' evidence.

At the hearing on Lacey's motion, plaintiffs' counsel argued that, as *Sylve* indicated, in November 2012, when plaintiffs believed a violation of section 37.9(a)(8) occurred, they "had an affirmative obligation to engage in due diligence to figure out whether or not the wrong actually did occur." That, he continued, was "exactly what happened here." Plaintiffs hired a private investigator, confirmed Lacey lived in Tiburon, learned permits had been taken out for major construction on the property and observed that "the property was a virtual construction zone that did not appear habitable. So [plaintiffs] believed that it was actually reasonable that Lacey was delayed in moving in because the property was in such a state." Counsel also cited Lacey's deposition testimony that Lacey intended in good faith to move into the property, but was delayed by the major renovations and his son's illness.

Lacey's counsel replied that plaintiffs "complaint does not plead delayed accrual or discovery or fraudulent concealment" and that plaintiffs failed to prove the facts essential to their delayed discovery argument. Therefore, "the delay discovery is nothing more than an argument. It is not evidence, it cannot support the denial of the summary judgment motion." Counsel also distinguished *Sylve* on its facts, contended it was not a delayed discovery case and claimed plaintiffs had a reasonable suspicion of Lacey's intent from April 2012 forward.

Plaintiffs' counsel responded with several arguments. He characterized "this long discussion about the delay discovery rule" as a "red herring" and stated, "There's no delay discovery analysis that's really required in this case, because there wasn't a delay in discovery and we're not alleging that there was some sort of fraud and concealing, that a wrong occurred. . . . Our clients were put on inquiry notice when three months after they moved out they saw that Mr. Lacey had not moved in yet. That created an affirmative obligation for them." Based on their investigation, counsel continued, plaintiffs

concluded that "it was actually reasonable that [Lacey] had not moved in yet because he had to do repairs on the property." Therefore, the delay discovery issue was "a red herring because it's not like [plaintiffs] weren't diligent in trying to discover whether a wrong occurred."

The trial court granted summary judgment in a written order. It concluded that plaintiffs' causes of action were time-barred since plaintiffs filed them more than one year after Lacey requested plaintiffs vacate the premises in April 2012, more than one year after Lacey served his 60-day notice terminating plaintiffs' tenancy on May 8, 2012, and more than one year after plaintiffs had actual notice that an alleged violation by Lacey had occurred, which they had by November 8, 2012. The court denied most of Lacey's evidentiary objections.

Subsequently, the court filed a judgment in favor of Lacey and awarded him attorney fees and costs totaling $124,066. Plaintiffs filed a timely notice of appeal from the judgment.

DISCUSSION

A defendant may move for summary judgment based on an affirmative defense to the action (Code Civ. Proc., § 437c, subds. (o)(2), (p)(2)), such as the statute of limitations. (See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191 [statute of limitations is an affirmative defense].) Once the defendant establishes all of the elements of the affirmative defense, the burden shifts to the plaintiff to show one or more triable issues of material fact regarding the defense. (Code Civ. Proc., § 437c, subd. (p)(2); *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484–1485.)

Generally, "[t]here is a triable issue of material fact if . . . the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A court should draw all reasonable inferences from the evidence in the light most favorable to the opposing party. (*Id.* at p. 843.) More specifically, "[w]hile resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts . . . are susceptible of only one legitimate

inference, summary judgment is proper." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112 (*Jolly*).) We conduct a de novo review. (*Aguilar*, at p. 860.)

I.

Plaintiffs Raised a Triable Issue of Material Fact Regarding Delayed Discovery.

Plaintiffs, relying on *Sylve* and evidence they submitted with their opposition below, argue the trial court erred in granting summary judgment because the applicable one-year limitations period was tolled until August 2013 under the delayed discovery rule. They contend they diligently sought to discover facts essential to their causes of action once they were put on inquiry notice of Lacey's possible wrongdoing in October 2012, but that they could not have discovered these facts before Lacey completed his renovations to the premises in July 2013. We conclude the delayed discovery evidence plaintiffs submitted below raised a triable issue of material fact regarding whether the statute of limitations was tolled and their complaint was timely filed.[3]

"The limitations period, the period in which a plaintiff must bring suit or be barred, runs from the moment a claim accrues. [Citations.] Traditionally at common law, a 'cause of action accrues "when [it] is complete with all of its elements"—those elements being wrongdoing, harm, and causation.' [Citations.] This is the 'last element' accrual rule; ordinarily, the statute of limitations runs from the 'occurrence of the last element essential to the cause of action.' " (*Aryeh v. Canon Business Solutions, Inc.*, *supra*, 55 Cal.4th at p. 1191.) However, the delayed discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807 (*Fox*).)

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[3] Lacey points out that plaintiffs' counsel below "expressly disavowed" the delayed discovery rule. Plaintiffs' counsel did state at the hearing that a delay discovery analysis was not required, but he then argued plaintiffs were on inquiry notice by October 2012, diligently investigated and discovered a reasonable basis for the premises' vacancy, i.e., Lacey's renovations. In other words, he in effect made a delayed discovery argument. Also, Lacey does not argue plaintiffs have forfeited their delayed discovery argument. Therefore, we address its merits.

Code of Civil Procedure section 340, subdivision (a) provides one year to file an action upon a statute for a penalty. As the parties acknowledge, a cause of action based on a violation of section 37.9(a)(8)(i) is governed by section 340, subdivision (a) because of the treble damages remedy in the San Francisco Rent Ordinance. (*Menefee v. Ostawari* (1991) 228 Cal.App.3d 239, 244 [claimed violations of the San Francisco Rent Ordinance governed by the one-year limitations period because of the penal nature of the remedies provided], followed in *Sylve*, *supra*, 15 Cal.App.4th at p. 26.) Since the wrongdoing under section 37.9(a)(8)(i) is a landlord's bad faith in endeavoring to recover possession of a rental unit, a cause of action accrues, and the limitations period begins, when the landlord first acts in bad faith. (*Sylve*, at p. 26.) The period is tolled, however, by a plaintiff's delayed discovery of the facts essential to a cause of action. (See *ibid*.)

Under the delayed discovery rule, "a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause . . . ." (*Fox*, *supra*, 35 Cal.4th at p. 803.) "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.' " (*Id*. at p. 807.) The limitations period " 'begins to run no later than the time the plaintiff learns, or should have learned, the *facts* essential to his claim.' " (*Ibid*., quoting *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897 (*Gutierrez*).) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly*, *supra*, 44 Cal.3d at p. 1111.)

Once put on inquiry notice, "plaintiffs are required to conduct a reasonable investigation . . . and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox*, *supra*, 35 Cal.4th at p. 808.) Their suspicions can also be "allayed by any investigation." (*Jolly*, *supra*, 44 Cal.3d at p. 1112; see *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 756–757, 759–760 [triable issue of fact regarding the limitations period existed where a medical malpractice plaintiff found out

breast lumps were from silicone injections, and only later learned they resulted from *negligent* injections].)

In *Sylve*, the defendant landlords evicted Sylve from a San Francisco rental unit under a previous version of section 37.9(a)(8), stating their son would move into the unit. (*Sylve*, *supra*, 15 Cal.App.4th at p. 25.) Sylve vacated the premises under a stipulation that she could sue her landlords if the son did not move in. (*Ibid*.) She sued, including for fraud, 19 months after noticing the unit appeared to be vacant and close to a year after concluding the landlords never intended their son would move in. (*Ibid*.) The trial court granted summary judgment to the landlords, concluding Sylve's action was time-barred under Code of Civil Procedure section 340, subdivision (a). (*Ibid*.)

On appeal, Division Five of this court considered whether the limitations period was tolled under the delayed discovery rule. (*Sylve*, *supra*, 15 Cal.App.4th at p. 26.) Sylve argued it was tolled until she concluded the landlords never intended their son to move in or, in the alternative, that whether she knew her eviction was improper earlier to this time was in dispute. (*Ibid*.) The landlords responded that Sylve was insufficiently diligent in investigating her suspicions. (*Ibid*.)

The *Sylve* court agreed with Sylve's alternative argument and reversed. It first noted that "[w]hether reasonable diligence was exercised is generally a question of fact [citation] precluding summary judgment." (*Sylve*, *supra*, 15 Cal.App.4th at p. 26.) It then concluded summary judgment was inappropriate because section 37.9(a)(8) did not address how long a landlord had to occupy, renovate or repair a vacated rental unit. (*Sylve*, at p. 27.) The problem was "inherent in the ordinance's language or lack thereof," and "[a]bsent more precise time limits, there will always be a factual dispute as to when the statute of limitations begins to run." (*Ibid*.) "Thus, there are triable issues of fact as to when, if ever, the appearance of vacancy constituted inquiry notice of [the landlords'] lack of intent to move their son into the premises, and what, if any further investigation was reasonable under the circumstances." (*Ibid*.)

Plaintiffs contend the judgment here should be reversed because they were even more diligent in investigating than Sylve and could not have discovered facts supporting

their suspicion that Lacey had acted in bad faith before he completed his renovations in July 2013. Lacey disagrees. Before addressing this issue, we briefly address the other two grounds Lacey asserted in support of his summary judgment motion.

First, Lacey perfunctorily argued below, and does so again on appeal, that plaintiffs' causes of action accrued in April 2012, when he requested they vacate the premises so he could move in, and plaintiffs were immediately suspicious of his intent. In his separate statement of undisputed facts, Lacey cited Skaar's deposition testimony that he declined Lacey's request because "[i]t didn't seem logical that [Lacey] would want to move into the unit," since Lacey had "a home very close by in Tiburon that his family owned."

Lacey also made the perfunctory argument below, and repeats on appeal, that plaintiffs' causes of action accrued when he served them with his May 8, 2012 termination notice (and on July 7, 2012, when they vacated the premises, a point he adds on appeal). Lacey proffered no additional evidence regarding plaintiffs' suspicions at those times.

Lacey bases these arguments on the contention that plaintiffs' subjective suspicion of his bad faith put them on inquiry notice, triggering the beginning of the one-year limitations period. We disagree. As we have discussed, the law requires a plaintiff to have a *reasonable* suspicion, i.e., "the statute of limitations begins to run when the plaintiff *has reason* to suspect an injury and some wrongful cause." (*Fox*, *supra*, 35 Cal.4th at p. 803, italics added.) That plaintiffs knew Lacey had a residence elsewhere was not such a reason. Virtually every landlord has a residence elsewhere, and quite possibly in the vicinity, when he or she endeavors to recover possession of a rental unit. Lacey's Tiburon residence was not sufficient to put plaintiffs on inquiry notice despite Skaar's subjective belief that Lacey's request was "illogical."

Lacey offers no legal authority to the contrary. Indeed, all the cases he relies on involve suspicions that were rooted in at least some reasonable factual basis. (*Gutierrez*, *supra*, 39 Cal.3d at pp. 895–896 [plaintiff's suspicions confirmed by doctors within months of her operation]; *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, 1682

[plaintiff suspicious that chiropractor's "inappropriate treatment" of his wife may have led to her death from a ruptured aortic aneurysm]; *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874–875 [plaintiff and her attorneys had some knowledge of how the value of stock was determined when she entered into marital settlement agreement but did not pursue specifics]; *Gray v. Reeves* (1978) 76 Cal.App.3d 567, 577 [plaintiff knew the deterioration of his hip socket was caused by prednisone and knew who prescribed and manufactured the drug, putting him on inquiry notice of his potential claims].) Lacey's argument that the limitations period was triggered regardless of whether there was a reasonable factual basis for plaintiffs' subjective suspicions is without merit.

In a related argument, Lacey contends that plaintiffs' legal conclusion (which was mistaken) that Lacey had violated section 37.9(a)(8) by not moving into the premises by November 2012 was sufficient to commence the limitations period. We disagree. "[I]t is the discovery of facts, not their legal significance," that starts the limitations period.[4] (*Jolly*, *supra*, 44 Cal.3d at p. 1113; see *Gutierrez*, *supra*, 39 Cal.3d at p. 902 ["limitations period . . . is not . . . tolled when a plaintiff with actual or constructive knowledge of the facts . . . is told by an attorney he has no legal remedy"].) The period does not begin to run until " 'the plaintiff learns, or should have learned, the *facts* essential to his claim.' " (*Fox*, *supra*, 35 Cal.4th at p. 807.) Further, plaintiffs' apparent belief that the statute required Lacey to occupy the premises within three months was incorrect. Section 37.9(a)(8) provides only a rebuttable presumption that failure to move within three months reflects bad faith.

Lacey's principal argument is that plaintiffs' causes of action accrued by November 8, 2012, when Skaar emailed a private investigator that Lacey was in "blatant violation" of section 37.9. By this time, plaintiffs had received Lacey's May 8

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[4] Based on this same principle, we also disregard as not relevant plaintiffs' legal argument that the rebuttable presumption is "either invalid or of extremely limited efficacy" under state law. As we discuss, the issue here centers on whether and when plaintiffs had knowledge sufficient to put them in inquiry notice and whether once armed with such knowledge they conducted a diligent investigation.

termination notice, consulted with an attorney, concluded that the deadline had passed for Lacey to make the premises his full-time residence, were informed on October 8, 2012, by a former neighbor that no one had moved in to the premises, and had personally observed that no one appeared to be living in the premises that fall. Also, while not mentioned by Lacey in his separate statement of undisputed facts, his May 8, 2012 termination notice states, "Landlord must move into the Premises within three (3) months of the date the tenant actually vacates the Premises," and recites that under section 37.9(a)(8) "[i]t shall be rebuttably presumed that the landlord has not acted in good faith if the landlord or relative for whom the tenant was evicted does not move into the [rental] unit within three months of the date you actually vacate the unit . . . ." These facts do not establish that Lacey had acted in bad faith, but the rebuttable presumption coupled with Lacey's failure to move into the premises within these three months was sufficient to put plaintiffs on inquiry notice that Lacey might have evicted them in bad faith.

However, plaintiffs argue with some persuasive force that, even if they were on inquiry notice of Lacey's possible bad faith by November 8, 2012, the trial court nonetheless erred because plaintiffs submitted evidence showing that from October 2012 forward they exercised reasonable diligence in investigating whether Lacey had evicted them in bad faith and were unable to confirm their suspicion until the end of July 2013, when he completed his renovations and the premises remained vacant. Specifically, Skaar stated in his declaration that he discovered Lacey took out building and construction permits for substantial renovation of the premises beginning in October 2012 and plaintiffs then retained a private investigator, monitored the renovation and in August 2013 learned the work had been completed. Skaar also stated the private investigator reported to plaintiffs in January 2014 that Lacey continued to reside principally in Tiburon, at which time they decided to sue.

Lacey did not dispute these facts. He could hardly have disputed them in light of his deposition testimony, which plaintiffs also submitted as part of their opposition. Lacey testified that in August 2012, he began "an extensive remodel" of the premises.

He demolished and redid the kitchen and bathroom, put in all new plumbing and electrical fixtures, restored the floors, patched, re-sealed and fixed up the walls, installed matching custom-made trim, and did "[v]ery extensive" work. Although he tried to expedite the work, it was "complicated"; "there was so much construction going on for . . . well over a year that you couldn't possibl[y] occupy the unit." The renovations, done pursuant to certain permits, were inspected and approved by August 2013, but the floors and the painting were not completed until the end of September. Lacey and his wife did not start spending the night in the premises until the late fall of 2013, and did not make the premises their primary residence until late February 2014.

This evidence raised triable issues of material fact. By October 2012, plaintiffs had a reasonable basis to suspect Lacey had acted in bad faith because he had not yet moved into the premises, but on further investigation learned of additional facts that could indicate he had a good faith basis for his delay, i.e., that he was substantially renovating the premises, rendering them uninhabitable. In other words, for a time their suspicions were "allayed by [their] investigation." (*Jolly*, *supra*, 44 Cal.3d at p. 1112.) Lacey does not explain what else plaintiffs could have done while the renovations were in progress to "go find the facts" indicating he had acted in bad faith. (*Id*. at p. 1111.) In any event, "[w]hether reasonable diligence was exercised is generally a question of fact [citation] precluding summary judgment." (*Sylve*, *supra*, 15 Cal.App.4th at p. 26.) If the one-year limitations period accrued in October 2012, plaintiffs' evidence could support a finding that the statute was almost immediately tolled upon their discovery of Lacey's undertaking to substantially renovate the premises and that the statute did not begin to run again until those renovations were completed at the end of July 2013. Plaintiffs filed suit seven and a half months thereafter, which would be timely under this delayed discovery theory. In short, putting aside for the moment plaintiffs' failure to plead the facts showing delayed discovery, plaintiffs' evidence raised triable issues regarding whether they were diligent in their investigation, whether the statute of limitations was tolled during Lacey's renovations of the premises and whether plaintiffs timely filed their complaint.

Lacey makes several other arguments for why plaintiffs' delayed discovery evidence is not a basis for reversing the judgment. First, he argues reversing summary judgment based on delayed discovery would be contrary to *Menefee v. Ostawari*, *supra*, 228 Cal.App.3d 239. *Menefee* is inapposite. While it held Code of Civil Procedure section 340, subdivision (a)'s one-year limitations period applies to section 37.9(a) claims, it did not address delayed discovery.

Second, Lacey contends plaintiffs did not provide admissible evidence that the premises were uninhabitable during his renovations. Not so. Lacey's own deposition testimony about the scope of the renovations and Skaar's declaration about Lacey's building and construction permits supported an inference that the premises were not inhabitable, and Skaar's declaration stated the premises did not appear to be habitable during the renovations. Lacey also claims plaintiffs failed to present legal authority establishing that uninhabitability matters. But the significance of the evidence of the premises' apparent uninhabitability during the renovations is obvious. That fact was one, among several, material facts suggesting plaintiffs' suspicions were reasonably allayed while the renovation work was being done. These facts raised triable issues regarding plaintiffs' diligence in investigating Lacey's bad faith and the tolling of the statute of limitations.

Third, Lacey argues that plaintiffs' delayed discovery evidence should be disregarded because plaintiffs did not submit it with a separate statement of undisputed facts in opposition to Lacey's summary judgment motion. An opposing party's failure to refer to evidence in a separate statement "may constitute a sufficient ground, in the court's discretion, for granting the motion." (Code Civ. Proc., § 437c, subd. (b)(3).) Here, the trial court considered this evidence, as the court ruled on, and denied, most of Lacey's evidentiary objections. The trial court did not abuse its discretion by considering it (see *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315–316 [applying abuse of discretion standard to a trial court's decision to consider evidence not referenced in the moving party's separate statement of undisputed facts]). Since the trial court considered it, we consider it as well.

II.

Plaintiffs Did Not Plead Facts Supporting Their Delayed Discovery Theory.

Lacey makes a fourth argument for affirmance, namely that we must disregard plaintiffs' delayed discovery theory because they did not plead facts supporting that theory in their complaint. Plaintiffs contend their complaint gave sufficient notice of their claim and, therefore, the complaint is not a bar against their assertion of delayed discovery in opposition to Lacey's summary judgment motion. We agree with Lacey.

Plaintiffs argue that the nature of their action—that Lacey acted in bad faith—lends itself to a claim of fraud regardless whether they labelled it fraud in their complaint. This is beside the point. Plaintiffs' opposition to Lacey's summary judgment motion was based not on their theory that he defrauded them, but on their theory that they were delayed in discovering Lacey's bad faith, whether fraudulent or otherwise. It is well-settled that a plaintiff who claims delayed discovery must plead and prove facts showing: " '(a) lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date). (c) How and when he did actually discover the fraud or mistake.' " (*Baker v. Beech Aircraft Corp.* (1979) 96 Cal.App.3d 321, 327–328; see also *Fox*, *supra*, 35 Cal.4th at p. 808 [plaintiff must plead delayed discovery facts in order to rely on that doctrine to defeat a demurrer].) In their complaint, plaintiffs did not allege the facts necessary to support their delayed discovery argument, nor did they seek to amend their complaint before the trial court ruled on Lacey's motion.

Our Supreme Court has held that trial courts must decline to consider a theory raised by a plaintiff in opposition to summary judgment if the argument is not supported by the plaintiff's pleadings. Under settled summary judgment standards, "[t]he materiality of a disputed fact is measured by the pleadings." (*Conroy v. Regents of University of Cal.* (2009) 45 Cal.4th 1244, 1250 (*Conroy*) [the pleadings set the boundaries of the issues to be resolved].) Thus, the moving defendant "need address only the issues raised by the complaint; the plaintiff cannot bring up new, unpleaded issues in his or her opposing papers." (*Government Employees Ins. Co v. Superior Court* (2000)

79 Cal.App.4th 95, 98, fn. 4.) This rule advances fairness; a defendant cannot be expected to refute a claim or theory on summary judgment that is nowhere to be found in the plaintiff's complaint.

Plaintiffs contend, citing a decades-old case, that the purpose of summary judgment is not to test the sufficiency of the pleadings (*Eagle Oil & Refining Co. v. Prentice* (1942) 19 Cal.2d 553, 560), and note that courts have considered unpleaded affirmative defenses asserted in opposition to summary judgment motions so long as the opposing party had adequate notice and opportunity to respond to the defense and was not prejudiced by its assertion. (See *Nieto v. Blue Shield of California Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 75.) In *Nieto*, an insurance company had pled the facts supporting an affirmative defense of fraud by the policyholder but failed to use the label "fraud." (See *id*. at pp. 74–75.) The court concluded the insurer had "adequately pleaded the issue of fraud in its answer." In dicta, the court also suggested courts may consider affirmative defenses that were not pled in an answer when a defendant asserts them in opposition to summary judgment. (*Id*. at p. 74.)

Whether affirmative defenses are immune from the rule reaffirmed most recently by the California Supreme Court in *Conroy* that the pleadings define the outer limits of the issues on summary judgment is an issue we need not resolve here. *Conroy* and the other cases we cite indicate that a defendant moving for summary judgment need only address the issues raised in a plaintiff's complaint, and that a plaintiff asserting delayed discovery in anticipation of an otherwise effective statute of limitations challenge must plead supporting facts in the complaint itself. Under these circumstances, we affirm the trial court's grant of summary judgment based solely on plaintiffs' defective complaint.[5]

[5] We are affirming on a ground not relied on by the trial court, but "supplemental briefing is not required under Code of Civil Procedure section 437c, subdivision (m)(2) because the ground on which we rely has already been briefed on appeal." (*Syngenta Crop Protection, Inc. v. Helliker* (2006) 138 Cal.App.4th 1135, 1175, fn. 16.)

III.

Plaintiffs Must Be Allowed to Seek Leave to Amend Their Complaint.

Plaintiffs argue we should reverse on their delayed discovery theory because the trial court should have given them the opportunity to amend their complaint before entering judgment, citing *Bostrum v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663 (*Bostrom*). In *Bostrom*, the appellate court discussed the appropriate relief when affirming a grant of summary judgment based on plaintiffs' failure to plead the facts they raised in their summary judgment opposition, when the trial court had not relied on their failure to plead these facts in granting defendants' motion. (*Id.* at pp. 1663–1664.) Although the court decided the appeal on other grounds, it noted that motions for summary judgment in the absence of a cognizable claim were " ' "allowed as being in legal effect motions for judgment on the pleadings." ' " (*Id*. at p. 1663.) The court continued, "However, if summary judgment is granted on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment." (*Id*. at p. 1663, citing *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 5 ["the trial court should not deny the motion outright on grounds of legal insufficiency, but should allow an opportunity to amend the complaint to include the missing allegations"].)

The *Bostrom* court did not indicate that the trial court had a sua sponte duty to allow the amending of a complaint to address a matter the trial court did *not* rely on to grant summary judgment, which is essentially the convoluted argument plaintiffs make here. However, the court stated that if the trial court had rested its grant of summary judgment on the Bostroms' failure to allege in their complaint any of the theories of liability urged in opposition to summary judgment, the plaintiffs "would have been entitled to seek leave to amend their complaint before entry of judgment so as to allege these omitted theories." (*Bostrom*, *supra*, 35 Cal.App.4th at p. 1664.) The court concluded, "If we were to hold that the complaint failed to state any viable cause of action, we would have discretion (and might even be required) to remand with directions

to permit the Bostroms to move for leave to amend." (*Ibid*.; see also *Kirby v. Albert D. Seeno Construction Co.* (1992) 11 Cal.App.4th 1059, 1063–1064, 1070 [trial court erred by not allowing plaintiffs leave to amend complaint to allege delayed discovery facts, requested for the first time in a motion for reconsideration of the court's grant of defendant's summary judgment motion on statute of limitations grounds].) The court further noted that "[s]uch requests are routinely and liberally granted." (*Bostrom*, at p. 1664.)

Because in both its tentative decision and the decision it ultimately adopted granting Lacey's motion, the trial court held insufficient plaintiffs' evidentiary showing and did not rely on the insufficiency of plaintiffs' complaint, there was no reason for plaintiffs to seek, or for the trial court to grant, leave to amend the complaint. However, reviewing the grant of summary judgment de novo, we conclude plaintiffs' evidence did raise a triable issue of fact, and affirm the grant of summary judgment only on the ground that plaintiffs failed to allege facts supporting delayed discovery in their complaint. We agree with *Bostrum* that under these circumstances, plaintiffs should be permitted to request leave to amend their complaint to add the missing allegations, which requests should be routinely and liberally granted, and will remand so they may do so.

Lacey argues that plaintiffs waived their delayed discovery theory by their failure to seek leave to amend their complaint before the trial court granted summary judgment, citing *Stalnaker v. Boeing Co.* (1986) 186 Cal.App.3d 1291. First, *Stalnaker* does not stand for this proposition. That court did not hold the plaintiffs opposing the defendants' summary judgment waived any claim or theory because of a defective pleading; rather, the court "deem[ed] waived *defendants*' objection to plaintiffs' irregular mode of pleading and argument," and noted that "[p]laintiffs could clearly have moved the court for leave to amend and to defer ruling on the summary judgment motion until the amendment had been granted." (*Id*. at p. 1302, italics added.) If anything, *Stalnaker* supports plaintiffs' and not defendants' argument. Further, as the *Bostrum* court noted, "If the motion for summary judgment presents evidence sufficient to disprove the plaintiff's claims, as opposed to merely attacking the sufficiency of the complaint, the

plaintiff forfeits the opportunity to amend to state new claims by failing to request it." (*Bostrom*, *supra*, 35 Cal.App.4th at p. 1664.) In *Conroy*, our high court quoted the same rule. (*Conroy*, *supra*, 45 Cal.4th at p. 1254.) Here, that forfeiture rule has no application because, as we have already discussed, Lacey did *not* disprove plaintiffs' delayed discovery theory.

DISPOSITION

The judgment is conditionally affirmed. This matter is remanded to the trial court with the instruction that the court give plaintiffs 60 days to move to amend their complaint. Should plaintiffs so move, the court should consider the motion and proceed accordingly, consistent with this opinion. If plaintiffs do not amend the complaint within the specified period, that court should enter final judgment in Lacey's favor. The parties shall bear their own costs of appeal.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.